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APPENDIX A

SUPREME JUDICAL COURT OF MASSACHUSETTS
SUFFOLK

Jan. 12, 1995.
Decided April 11, 1995.

PROPAC-MASS, INC.

—v.—

COMMISSIONER OF INSURANCE.

Before LIACOS, C.J., and
WILKINS, NOLAN and GREANEY, JJ.

EDWARD B. DEUTSCH, Morristown, N.J. (Raymond J. Kenney, Jr., Boston, with him), *for plaintiff.*

THOMAS A. BARNICO, Asst. Atty. Gen., *for Com'r of Ins.*

WILKINS, *Justice.*

Pursuant to G.L. c. 175, § 5 (1992 ed.), the plaintiff (Propac) appealed from the revocation by the defendant Commissioner of Insurance (commissioner) of its license as attorney-in-fact for Massachusetts Employers Insurance Exchange

(Exchange), a reciprocal insurance exchange (see G.L. c. 175, §§ 94A-94M [1992 ed.]) that provides workers' compensation insurance to its employer subscribers. A single justice of this court considered the case on the complaint, the answer, memoranda, and argument of counsel, and without opinion denied the petition under G.L. c. 175, § 5. Propac appeals.

On Friday, December 31, 1993, the commissioner revoked Propac's license without a hearing, effective immediately. The commissioner's notice of revocation of the license was based on the decision in the Superior Court action brought by members of the Exchange and others against Propac. That decision is the subject of our opinion, released today, in Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., 420 Mass. 39, 648 N.E.2d 435 (1995).

The commissioner stated in her revocation notice that, on December 9, 1988, Propac had been licensed to execute contracts of reciprocal or inter-insurance for the Exchange's subscribers and that on that date Propac and the Exchange, through its board of advisors, had entered into a management services (or attorney-in-fact) contract. The commissioner noted that in December, 1992, the Exchange, through its board of advisors, had given notice of termination of the attorney-in-fact agreement, effective December 31, 1993, and that on December 17, 1993, she had licensed another entity to act as the Exchange's attorney-in-fact, effective January 1, 1994.

The commissioner's revocation notice continued:

> "Propac's legal relationship with [the Exchange] and its subscribers is thus terminated on December 31, 1993, rendering impossible Propac's performance of the duties of [attorney-in-fact] for [the Exchange] as contemplated by the license granted to [the Exchange] on December 9, 1988. The court's findings and rulings are clear and mean that Propac has no exchange with which to do business after the December 31, 1993 termination date. Also, because it is not itself an insurer within the meaning of c. 175, it cannot provide the necessary and

> promised coverage to [the Exchange] subscribers it would purport to represent as [attorney-in-fact]. Thus, Propac's license, which is particular to [the Exchange], does not authorize Propac to do the business of [attorney-in-fact] for [the Exchange], because Propac, after December 31, 1993, will have no legal relationship with [the Exchange] or its subscribers."

The commissioner added that "in a meeting held at the Executive Office of Consumer Affairs on December 30, 1993, immediately following the issuance of the Superior Court's decision, Propac indicated to me that it would pursue continued [attorney-in-fact] business with [the Exchange] after December 31, 1993, servicing subscribers it claims to represent because Propac still holds a valid license."

The commissioner continued her discussion of the circumstances as follows:

> "The Division of Insurance has received numerous inquiries from anxious [Exchange] subscribers who have expressed confusion about their workers' compensation insurance contract renewals and concern about the future of that coverage and of the Exchange itself. Propac's conduct clearly indicates that there will be no smooth transition to a new [attorney-in-fact]. Rather, Propac's posture threatens the stability of the Exchange. The subscribers' coverage is jeopardized and may result in financial liability to the subscribers and a disruption in services and benefits of injured workers to whom the Exchange is obligated. I have grave concerns about the ability of [the Exchange] to conduct its business as an exchange after December 31, 1993 because control and possession of the Exchange's assets, claims files and other financial and administrative materials improperly rests, especially in light of the court's decision, with Propac. Propac's expressed intention to continue to act as [the Exchange's attorney-in-fact] after December 31, 1993, is indicative of Propac's intention not to partici-

> pate in the orderly transition by [the Exchange] to a new [attorney-in-fact]."

The commissioner concluded: "Propac has engaged, and has indicated its intent to continue to engage, in conduct which renders its further transaction of business hazardous to the public and the subscribers of [the Exchange]. G.L. c. 175, s. 5 and s. 94F require me to revoke a company's license when these grounds are demonstrated."

The license was revoked effective immediately. Notice of the revocation was sent that day by registered mail to Propac. This action was commenced eleven days later.

1. We consider first Propac's argument that the commissioner lacked authority under G.L. c. 175, § 94F, to revoke its license, and that certainly the commissioner could not lawfully revoke that license without a hearing.

The commissioner, if satisfied that the conditions for the issuance of a license have been met, must issue a license to transact business to an attorney-in-fact, authorizing the attorney-in-fact to execute for the subscribers such contracts of reciprocal or inter-insurance as G.L. c. 175 authorizes. G.L. c. 175, § 94F. The license issued to the attorney-in-fact "shall be subject to section five" of G.L.c. 175. Id. Section 5, which concerns the revocation or suspension of licenses and does not provide for a prerevocation agency hearing, by its terms applies only to a foreign company, that is, one formed by authority of another State or country (G.L. c. 175, § 1 [1992 ed.]). An attorney-in-fact, however, need not be a company formed elsewhere. See G.L. c. 175, § 94A, defining "Attorney in fact" as "an individual, partnership or corporation." An attorney-in-fact may also be domestic. Cf. G.L. c. 175, § 94B ("The principal office of the attorney in fact shall be maintained at such place as is designated by the subscribers in the power of attorney").

Because the Legislature has directed that each license of an attorney-in-fact is subject to § 5, we do not hesitate to apply § 5 to all attorneys-in-fact licensed pursuant to § 94F, includ-

ing an attorney-in-fact that is not a foreign company. It is not reasonable to conclude that its reference to § 5 was designed to authorize the suspension or revocation of the license of only those attorneys-in-fact that happen to be foreign companies. Section 94F concerns all licenses of attorneys-in-fact issued under that section. The commissioner, therefore, acted properly in relying on § 5 to revoke Propac's license.

Propac argues next that, in any event and quite apart from § 5, the State Administrative Procedure Act (G.L. c. 30A [1992 ed.]) provides that Propac's license could not properly be revoked without first offering it a hearing. Section 13 of G.L. c. 30A provides that "[e]xcept as otherwise provided in this section, no agency shall revoke . . . any license unless it has first afforded the licensee an opportunity for hearing in conformity with" certain sections of G.L. c. 30A. Among the circumstances to which the hearing requirement does not apply is the "revocation of the license of a foreign insurance company by [the] commissioner under authority of [G.L. c. 175, § 5]," if the revocation is on the ground, among other things, that the company's "condition or management is such as to render its further transaction of business hazardous to the public or its policyholders." For the reasons that we have already stated in concluding that § 5 applies to Propac, we conclude that the exemption stated in G.L. c. 30A, § 13, applies to all license revocations of attorneys-in-fact licensed under G.L. c. 175, § 94F. Therefore, G.L. c. 30A, § 13, did not require a prerevocation agency hearing in this case.

2. Propac next argues that, if G.L. c. 175, § 5, applies to the revocation of its license and the statutes permit the commissioner to act without a prerevocation hearing, § 5 violates its right to due process of law under the State and Federal Constitutions. Section 5 does not provide for a prerevocation hearing, but only for notice of the revocation. It further provides the right, within ten days of the effective date of the revocation, to petition a single justice of this court, as Propac did, for a summary hearing and review of the action of the commissioner.

We need not determine whether § 5 meets constitutional due process requirements by furnishing an aggrieved licensee only a summary judicial hearing after the revocation of its license. Propac had already had a judicial hearing in the Superior Court concerning the circumstances on which the commissioner based her revocation decision. See Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., supra at 39, 648 N.E.2d 435. On principles of collateral estoppel, Propac was bound by the findings of fact in the Superior Court case even if the Superior Court judgment was on appeal. Certainly due process of law principles did not entitle Propac to two hearings. See Brunson v. Wall, 405 Mass. 446, 449-451, 541 N.E.2d 338 (1989); Haran v. Board of Registration in Medicine, 398 Mass. 571, 575-581, 500 N.E.2d 268 (1986). Cf. Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 382 Mass. 580, 589-590, 416 N.E.2d 1373 (1981) (revocation of motor vehicle license); Almeida v. Lucey, 372 F.Supp. 109, 112 (D.Mass.) (same), aff'd, 419 U.S. 806, 95 S.Ct. 22, 42 L.Ed.2d 36 (1974).

The commissioner did not deny Propac's right to due process of law nor did she act arbitrarily or capriciously in revoking Propac's license. The commissioner properly relied on the findings and rulings that the trial judge had made, and that we have now upheld, in Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., supra.

Finally, Propac complains that it did not receive notice of the revocation of its license before the revocation was purportedly effective. In the case of a revocation on the ground that a company violated a provision of law or failed to comply with its charter, the revocation may not be effective in less than ten days from the date of issue of the notice. G.L. c. 175, § 5. Revocations for other reasons stated in § 5, including the reason in this case ("its condition or management is such as to render its further transaction of business hazardous to the public or its policyholders"), have no such time limitation. We see no reason why, in such a case, the commissioner cannot properly announce that the "license is revoked

effective immediately." Nor do we see any reason to declare the revocation invalid, even if immediate revocation were not authorized. Propac received the notice within three days on Monday, January 3, and we are not concerned with events between the date of the revocation and January 3.

We affirm the order of March 29, 1994, denying Propac's petition (which we construe as a judgment affirming the revocation of the attorney-in-fact license of Propac-Mass, Inc.).[1]

So ordered.

---

[1] Propac's complaint in its heading stated that it contained a request for declaratory relief, but no such request appears in the body of the complaint. Therefore, although the single justice denied the request for declaratory relief, we do not direct that a declaration of rights be included in a new judgment.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
SUFFOLK, SS.

No. 94-013

PROPAC-MASS, INC.

vs.

COMMISSIONER OF INSURANCE, LINDA RUTHARDT

AMENDED ORDER

This matter came before the Court, Lynch, J., presiding, on a petition under G. L. c. 175, sec. 5 and request for declaratory relief. There was argument by counsel for the parties and upon consideration thereof, it is ORDERED that the petition under G. L. c. 175, sec. 5 and the request for declaratory relief be, and the same hereby is, denied.

By the Court, (Lynch, J.)

[ILLEGIBLE]
Assistant Clerk

Entered: March 29, 1994

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
SUFFOLK, SS.

NO. SJ-94-0013

PROPAC-MASS, INC.

v.

COMMISSIONER OF INSURANCE, LINDA RUTHARDT

ORDER

This matter came before the Court, Lynch, J., on a petition requesting declaratory relief pursuant to G.L. c. 175, sec. 5. There was argument by counsel for the parties and upon consideration thereof, it is ORDERED that the petition be, and the same hereby is, denied.

By the Court, (Lynch, J.)

[ILLEGIBLE]
Assistant Clerk

Entered: March 14, 1994

APPENDIX D

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF CONSUMER AFFAIRS
DIVISION OF INSURANCE
470 ATLANTIC AVENUE
BOSTON, MA 02210-2208
(617) 521-7794

PRISCILLA H. DOUGLAS
SECRETARY
LINDA RUTHARDT
COMMISSIONER

Lena Chang, President
Propac-Mass., Inc.
255 Washington Street
Newton, MA 02762

BY REGISTERED MAIL

NOTICE OF REVOCATION OF LICENSE
DOCKET E93-21

FACTS

On December 9, 1988, the Commissioner of Insurance ("Commissioner") issued a license to Propac-Mass, Inc. ("Propac") to "execute contracts of reciprocal or inter-insurance for the subscribers of [the Massachusetts Employers Insurance Exchange]" ("MEIE", the "Exchange"). Pursuant to the provisions of G.L. c. 175, s. 94F, Propac's license is subject to provisions of G.L. c. 175, a.5.

Also on December 9, 1988, Propac and MEIE, through its Board of Advisors (the "Board") entered into a management services contract (the "agreement"). Among its provisions, the agreement contained procedures for the termination of the agreement at the end of its initial five-year term. In December, 1992, by vote of its duly constituted and authorized

Board. MEIE gave notice of termination of the AIF agreement to Propac, in accordance with the terms of the agreement, to take effect on December 31, 1993. On December 17, 1993, upon application and examination, the Commissioner issued a license to MEIE-AIF, Inc. to act as MEIE's attorney-in-fact ("AIF"), effective January 1, 1994.

Under the terms of the AIF agreement, once the notice of termination was given by MEIE, Propac was required to cooperate in an orderly transition to a new AIF. Citing Propac's refusal to extend such cooperation, MEIE sued Propac in the Superior Court of the Commonwealth, seeking essentially injunctive relief and specific performance of the terms of the AIF agreement by Propac. The Superior Court issued its decision on December 30, 1993 attached hereto as Exhibit A. (the "decision")

DISCUSSION

The Superior Court found that MEIE's Board has the power "to set the terms of the termination of the attorney-in-fact" and that through the bargained-for AIF agreement, the Exchange and Propac had done so in "unambiguous terms." The court ruled that the termination of the attorney-in-fact agreement with Propac by MEIE's Board has effect (on the termination date, December 31, 1993), and that G.L. c. 175, s. 94K, the agreement, the by-laws, *the license granted to the attorney-in-fact* (emphasis added), the certificate of authority to conduct business granted to the Exchange and the power of attorney "[are] instruments integrated with each other forming one transaction governed by the statute, c. 175, ss. 94A-94M."

Propac's legal relationship with MEIE and its subscribers is thus terminated on December 31, 1993, rendering impossible Propac's performance of the duties of AIF for MEIE as contemplated by the license granted to MEIE on December 9, 1988. The court's findings and rulings are clear and mean that Propac has no exchange with which to do business after the December 31, 1993 termination date. Also, because it is not

itself an insurer within the meaning of c. 175, it cannot provide the necessary and promised coverage to MEIE subscribers it would purport to represent as AIF. Thus, Propac's license, which is particular to MEIE, does not authorize Propac to do the business of AIF for MEIE, because Propac, after December 31, 1993, will have no legal relationship with MEIE or its subscribers.

In its unambiguous decision, the court found that Propac "did not accept its notice of termination . . . [i]t challenged the Exchange's authority to terminate its AIF. Propac removed files to another location without notice to the Exchange. Propac informed the Exchange on November 15, 1993, that it was vacting the Exchange's principal office. Propac informed AIM subscribers that their worker's compensation insurance would be jeopardized if they signed a new Power of Attorney appointing a different AIF. Propac instructed AIM subscribers to pay premiums to it instead of to the Exchange. Propac conducted a campaign to solicit AIM subscribers for its own account. Propac, in sum, challenged AIM in the marketplace and in the courtroom."

Moreover, the court found that Propac refused to cooperate with the Exchange in an orderly transition to a new attorney-in-fact and that Propac engaged in "a campaign to retain office in breach of a covenant, fairly read, that permits the "Exchange, without cause, to terminate it." The court ruled that Propac "is in violation of its covenant, implied in the agreement, of good faith and fair dealing," and further ruled that "Propac's conduct constitutes unfair acts of practices in violation of [G.L.] c.93A."

Despite the court's finding that Propac's license cannot be viewed in isolation of the Exchange's other governing documents, including the AIF agreement which terminates on December 31, 1993, in a meeting held at the Executive Office of Consumer Affairs on December 30, 1993, immediately following the issuance of the Superior Court's decision, Propac indicated to me that it would pursue continued AIF business with MEIE after December 31, 1993, servicing subscribers it claims to represent, because Propac still holds a valid license.

The Division of Insurance has received numerous inquiries from anxious MEIE subscribers who have expressed confusion about their workers' compensation insurance contract renewals and concern about the future of that coverage and of the Exchange itself. Propac's conduct clearly indicates that there will be no smooth transition to a new AIF. Rather, Propac's posture threatens the stability of the Exchange. The subscribers' coverage is jeopardized and may result in financial liability to the subscribers and a disruption in services and benefits of injured workers to whom the Exchange is obligated. I have grave concerns about the ability of MEIE to conduct its business as an exchange after December 31, 1993 because control and possession of the Exchange's assets, claims files and other financial and administrative materials improperly rests, especially in light of the court's decision, with Propac. Propac's expressed intention to continue to act as the MEIE's AIF after December 31, 1993, is indicative of Propac's intention not to participate in the orderly transition by MEIE to a new AIF.

ORDER

Accordingly, I find, on the basis of the evidence submitted to me as aforesaid, that Propac has engaged, and has indicated its intent to continue to engage, in conduct which renders its further transaction of business hazardous to the public and the subscribers of MEIE, G.L. c. 175, s. 5 and s. 94F require me to revoke a company's license when these grounds are demonstrated.

Further, as found by the court, Propac has consistently failed to recognize the Board's authority over the Exchange (authority which the court has clearly ruled the Board has), holding itself out to subscribers and to the public as the Exchange or its management and preventing the Board from managing the Exchange. Therefore, the hazard to the public and to the subscribers of MEIE is caused not by the Exchange through its Board, but by the conduct of Propac as "administrative management" of the Exchange.

Based upon all the evidence to me as aforesaid, in accordance with the provisions of G.L. c. 175, s. 5 and s. 94F, it is hereby ordered that Propac's license is revoked, effective immediately. Propac's failure to conduct itself in a professional and reasonable manner so as to result in an orderly transition to a new AIF will subject Propac to possible civil and other prosecution permitted by the laws of the Commonwealth of Massachusetts.

/s/ LINDA RUTHARDT
Linda Ruthardt
Commission of Insurance
December 31, 1993

In accordance with the provisions of G.L. c. 175, s. 5, if it is aggrieved by this revocation. Propac's remedy lies in a petition to the Supreme Judicial Court.

cc: Propac-Mass, Inc.
155 Maple Street, Springfield, MA 01105
13 Roszel Road, Princeton, NJ 08540

Robert A. LaRosa, Chairman
Board of Advisors, MEIE

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF CONSUMER AFFAIRS
DIVISION OF INSURANCE
470 ATLANTIC AVENUE
BOSTON, MA 02210-2208
(617) 521-7794

PRISCILLA H. DOUGLAS
SECRETARY
LINDA RUTHARDT
COMMISSIONER

AFFIDAVIT OF SERVICE

Pursuant to G.L. c. 175, secs. 5, 94F. I hereby certify that on this date the Notice of Revocation of License, Division of Insurance Docket No. E93-21, has been served upon PROPAC-MASS, Inc., by registered mail, postage prepaid, at its office addresses at 255 Washington Street, Newton, Massachusetts 02762; 155 Maple Street, Suite 305, Springfield, Massachusetts 01105; and 13 Roszel Road, Princeton New Jersey, 08540.

Dated: December 31, 1993

/s/ LINDA RUTHARDT
Linda Ruthardt
Commissioner of Insurance

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT

Civil Action No. 93-4987-G

MASSACHUSETTS EMPLOYERS INSURANCE EXCHANGE, and ASSOCIATED INDUSTRIES OF MASSACHUSETTS, INC., ATCO PLASTICS, INC. and HUMBOLDT STORAGE & MOVING CO. as representative members of the MASSACHUSETTS EMPLOYERS INSURANCE EXCHANGE,

Plaintiffs,

—vs.—

PROPAC-MASS, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

We are asked to determine that defendant, Propac-Mass., Inc., ("Propac"), breached its Attorney-In-Fact Agreement ["the agreement"], with the Massaschusetts Employers Insurance Exchange, an unincorporated association of individual subscribers conducting business as a domestic reciprocal insurance exchange created under G.L. c. 175 §§ 94A-94M at 222 Berkeley Street, Boston ("the Exchange"); that Propac violated its implied covenant in the agreement of good faith and fair dealing; and that as a consequence Propac violated G.L. c. 93A, §§ 2 and 11. As their remedy, the Exchange seeks a mandatory injunction ordering Propac to comply with

Paragraph 16 of the agreement, essentially covenants requiring Propac, on notice of termination, to perform tasks and to behave in a manner to insure an orderly transition so that Propac's successor may be in position on January 1, 1994 to exercise its responsibilities on that date pursuant to its Attorney-in-Fact Agreement with the Exchange. Lastly, the Exchange requests a reasonable attorney's fee and expenses. Propac denies that it has been terminated as the Attorney-in-Fact for the subscribers of the Exchange and therefore denies that it is in breach of the agreement. Propac asks that the complaint be dismissed and for its counsel fees and expenses. The matter was tried to the court on the merits on December 2, 3, 6, 7, 8 and 14, 1993. The Court heard ten witnesses and received 64 exhibits in evidence. After consideration, the Court finds and rules as follows:

FINDINGS OF FACT

We begin with the year 1984. In that year and continuing through 1988, the Associated Industries of Massachusetts, Inc. ("AIM"), a trade association of Massachusetts businesses conducting its affairs as a not for profit Massachusetts corporation, sponsored a workers' compensation group insurance program for its members. That program, in which more than 300 AIM members were enrolled, was underwritten by Liberty Mutual Insurance Company. On January 22, 1988, Liberty Mutual, deciding to withdraw its participation, notified AIM that effective January 1, 1989, it would no longer continue to underwrite the program. At that point, Robert LaRosa, an Executive Vice-President of AIM, sought to establish a group self-insurer program. His efforts, however, proved fruitless and soon were abandoned. LaRosa then turned to Dr. Lena Chang, Dr. Chang, trained as mathematician, had been a consultant to AIM on workers' compensation matters. She also had served in Massachusetts on a Governor's Task Force dealing with insurance issues. Her husband, James Sheeran, Esq., a former Commissioner of Insurance in

the State of New Jersey, had participated in insurance related businesses principally in New Jersey and had experience with a reciprocal insurance exchange. By letter dated June 2, 1988, Dr. Chang proposed that AIM sponsor such an exchange to provide workers' compensation insurance to AIM members.

At this point, we interrupt our narrative to describe the nature of such an exchange. A creature of statute, an exchange as a generic notion is

> "a system of insurance under which several individuals may underwrite each other's risks against various hazards through an attorney-in-fact common to all, under an agreement that each underwriter acts separately and severally and not jointly with any other. All the subscribers are insured and at the same time are insurers. The insurance exchange thus formed has no corporate existence, but is an unincorporated association of individual subscribers. The attorney-in-fact represents each subscriber individually in exchanging insurance with others and is authorized to do every act that the subscriber could do in relation to the common enterprise. None of the members or subscribers to an insurance exchange deal directly with each other. All exchanges of insurance are effected through the common representative—the common attorney-in-fact. The subscriber pays a premium or membership fee to the exchange. From the premium a fixed percentage is deducted as the attorney-in-fact's fee." *In Re International Re-Insurance Corp.*, 32 Del. Ch. 28, 32, 78A 2d 744 (1951), *affirmed*, 86A 2d 647 (1952).

Returning to our account, on June 10, 1988, AIM undertook sponsorship by providing a subordinated loan of $200,000 to an exchange to serve as initial surplus. On August 3, 1988, Propac was incorporated under Massachusetts law. Mr. Sheeran and Dr. Chang, its two stockholders, became President and Vice-President, respectively. On August 9, 1988, pursuant to § 94C, AIM, and five of its members, applied to

the Commissioner of Insurance for a preliminary certificate to solicit subscribers. AIM designated Propac as its representative to meet with representatives of the Division of Insurance. On August 24, 1988, a preliminary certificate was issued by the Commissioner. Personnel of the Exchange, with the assistance of Propac employees and materials, then began to solicit AIM members for membership in the Exchange. By October 19, 1988, 63 persons had subscribed to the Exchange. On that date, the Exchange, through Propac, applied for a provisional certificate of authority to conduct business. The Exchange's filing included a form of power of attorney drafted by Propac to be executed by each subscriber, and bylaws, also prepared by Propac, to govern the Exchange. On December 9, 1988 the Commissioner issued a provisional certificate to the Exchange and a license to Propac authorizing Propac to execute reciprocal contracts of insurance in the subscriber's name. Under that date, Propac and the Exchange signed the agreement.[1] The agreement, effective January 1, 1989, was based on a form of contract employed by Mr. Sheeran in the past and refashioned in part, principally paragraph 17, termination for cause, by counsel for AIM, before being signed by the parties. I find that the provisional certificate, the license to Propac and the attorney-in-fact agreement were a part of and formed one contemporaneous transaction. The Exchange began operation on January 1, 1989 and has continued to function to date. The Exchange now has 819 subscribers.

On December 1, 1992, the Board of Advisors met and after hearing Dr. Chang and Mr. Sheeran voted to terminate the agreement. By letter dated December 4, 1992, the Board, through LaRosa, informed Propac that "it [was] terminating the [agreement] on the completion of the five year term, ending December 31, 1993." The Board elected to terminate

---

[1] The agreement was signed by LaRosa and Ralph P. Schlenker, two of the three members of the Board of Advisors on behalf of the Exchange and by Mr. Sheeran on behalf of Propac.

under paragraph 16, the so-called "no cause termination provision", about which we will comment later.

In view of a Propac challenge to the validity of the Exchange's action in terminating the agreement because of the claimed legal infirmity of the Board of Advisors to do what it purported to do, we detour to discuss the establishment of the Board and its composition.

G.L. c. 175, § 94K provides in part that an

> "Advisory Committee or other similar Committee or board composed of not less than three subscribers, shall be elected or appointed by each exchange in the manner provided by the power of attorney which Committee or board shall have the authority and duties provided therein."

The power of attorney here, however, is silent on the subject of a board of advisors. The function of the Board is addressed in Art. VIII, § 1 of the Exchange which provides that "The business and affairs of the Exchange, subject to the contract with the Attorney-in-Fact, shall be under the advice and direction of the board of advisors." We shall return to that subject.

We turn next to the composition of the Board. The original members of the Board assumed their office in October, 1988 and consisted of Messrs. LaRosa and Schlenker and one Droukas. On May 7, 1991, at the second annual meeting of the subscribers, all subscribers present voted to expand membership on the Board to five, to reelect Schlenker to a three year term and to elect John Gould and Michael J. Riley to the Board. Those gentlemen with LaRosa and Droukas, whose initial terms had not expired, constituted the five person board. However, a quorum of subscribers was not present at the meeting. At the Exchange's third annual meeting on May 5, 1992, by unanimous vote, LaRosa was reelected and one Jorjorian elected to replace Droukas. Again, a quorum was not present. After this litigation was filed, by unanimous consent on November 4, 1993, the Board voted to ratify its action in

expanding its membership to five and in appointing Messrs. Gould, Riley and Jorjorian as members. The following day, November 5, 1993, by unanimous consent, the Board ratified its December 1, 1992 termination of the agreement.

Our detour complete, we return to our principal account. On July 27, 1993, the Board by letter reminded Propac of its obligation to facilitate an orderly transition of its services. Propac, however, did not accept its notice of termination. Rather than cooperating with the Exchange to insure an orderly and peaceful transition, it challenged the Exchange's authority to terminate it as attorney-in-fact. Propac removed files to another location without notice to the Exchange. Propac informed the Exchange on November 15, 1993 that it was vacating the Exchange's principal office. Propac informed AIM subscribers that their workers' compensation insurance would be jeopardized if they signed a new power of attorney appointing a different attorney-in-fact. Propac instructed AIM subscribers to pay premiums to it instead of the Exchange. Propac conducted a campaign to solicit AIM subscribers for its own account. Propac, in sum, challenged AIM in the marketplace and in the courtroom.

We turn now to our conclusions of law.

CONCLUSIONS OF LAW

THRESHOLD

This lawsuit is brought by Associated Industries of Massachusetts, Inc., ATCO Plastics, Inc. and Humboldt Storage & Moving Co. as representative members of the Exchange under Mass. R. Civ. P. 23.2. Defendant submits that the Exchange, as an unincorporated association, may not be a party to this litigation and that as "no subscriber may act to revoke or affect another subscriber's power of attorney or contract of insurance"; no named plaintiff is a representative subscriber. *Defendant's Proposed Rulings of Law* at 8-9. It appears that under Massachusetts law an unincorporated asso-

ciation is not a legal entity and thus may not be party to a lawsuit. *Harvard Square Defense Fund, Inc.* v. *Planning Board of Cambridge*, 27 Mass. App. Ct. 491, 496 n.9 (1989). Rule 23.2 permits an action by "members of an unincorporated association as a class by naming certain members as representative parties [to] be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members." Simply put, the question is will the named plaintiffs fairly and adequately protect the interests of the subscribers? *Management Television Systems, Inc.* v. *The National Football League, et. al.*, 52 F.R.D. 162, 164 (E.D. PA. 1971). The named plaintiffs are longstanding subscribers to the Exchange, and share the interest that control of the Exchange remain with the subscribers through the Board of Advisors. As a consequence of this finding, the court rules that they are representative members of the Exchange and are entitled to prosecute this action against this defendant on behalf of the Exchange and their individual subscribers. *Cheever* v. *Graves*, 32 Mass. App. Ct. 601, 604-605 (1992).

Propac argues that the notice of termination was without legal effect because the Board was without authority to act on behalf of the Exchange. Propac's argument is bottomed on the circumstance that the members of the Board of Advisors on date of the notice of termination, were without authority to hold office. Propac's ground is that the members were elected at meetings of the subscribers which did not contain a quorum. Plaintiffs contend that Propac is without standing to make that argument; that Propac "may not be heard to challenge matters relating to" the Exchange's governance. The court adopts plaintiffs' view. *See Bello* v. *South Shore Hospital*, 384 Mass. 770 (1981); *Council of Jewish Women* v. *Boston Section Council of Jewish Women*, 212 Mass. 219 (1912). Moreover, the board members in voting to terminate the agreement purported to exercise the powers of their office and may be perceived as *de facto* board members. No third person may "collaterally show the illegality of the election of

the *de facto* [directors], where no other persons are claiming a right to act as directors, and the incumbents are exercising the usual functions of the office."[2] *Stratton-Massachusetts Gold Minds Co.* v. *Davis*, 222 Mass. 549, 553 (1916). Finally, Propac having received the benefits of the agreement since January 1, 1989, may not now claim that the notice of the termination was *ultra vires*. "It is well settled in the Commonwealth that a defendant in a contract action cannot use an ultra vires defense when the defendant has received the benefit of the bargain." *Valley Stream Teachers Federal Credit Union* v. *The Commissioner of Banks*, 376 Mass. 845, 856 (1978). *See also Williston On Contracts*, Vol. 2. at 474 n. 17 (3rd ed. 1959 & Supp. 1993). "[O]ne who Contracts with an association as a legal entity and capable of transacting business and receives money or other valuable consideration therefrom may not deny the validity of the contract on the ground that the association has no legal existence." The court rules that Propac may not challenge the legal effectiveness of the notice of termination on the ground that the members of the Board of Advisors were without authority to execute and deliver that notice.

MERITS

We begin with four statutory definitions.

> " 'Attorney in Fact' [a] . . . . . corporation acting under power of attorney as the representative of the subscribers in the exchange of reciprocal or inter-insurance contracts and matters incident thereto
>
> " 'Subscribers', the participants or policy holders, who have given to an attorney in fact a power of attorney giving authority to obligate them separately and severally,

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[2] There was no evidence that Mr. Sheeran and Dr. Chang, or either, were aware at any time prior to the filing of this lawsuit that Board members were without legal authority to hold their office.

> as specified therein, in the exchange of reciprocal or inter-insurance contracts.
>
> " 'Exchange', an aggregation of individuals, partnerships or corporations, herein called subscribers, who or which, under a common name, exchange contracts of insurance on the reciprocal or inter-insurance plan through the office of an attorney in fact, being the place where contracts of insurance are issued." G.L. c. 175 § 94A.

Propac argues that the notice of termination given under paragraph 16 of the agreement is without legal effect because that paragraph by its terms does not provide that the Board of Advisors may give such notice. Propac, in support of its contention, points to the language of paragraph 17, the provision governing termination of the agreement prior to its term for good cause, where the Board of Advisors explicitly is the agent through which termination is triggered.[3] Hence Propac argues that as paragraph 16 did not give the Board of Advisors a role in terminating the agreement, the Board had no authority to give the challenged notice. Paragraph 16 of the agreement provides that:

> "Upon execution, this Agreement shall be effective for a term of five (5) years from the Anniversary Date and shall continue from year to year thereafter, unless terminated by either party on the fifth year, by one years prior written notice, or at any subsequent Anniversary Date by written notice to the other given at least one (1) year prior to said Anniversary Date.

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[3] "Termination for Good Cause shall only be made by a decision of the full Advisory Committee of the Exchange after providing the AIF a full hearing before the Committee, after ten (10) days advance written notice of the meeting, which states that among its purposes is consideration of terminating this Agreement for Good Cause. . . . . .

"In the event that the Advisory Committee decides to terminate the agreement under this section, AIF shall first have the right to require that the matter be submitted to arbitration pursuant to the provisions of § 21 of this agreement."

> In the event that either party gives such notice of termination, the Exchange shall have the right, during the year preceding the termination date, to make any and all arrangements necessary or desirable, in its discretion and at its cost and with no reduction of [Propac's] fee, to provide for personnel and facilities for the performance of the service performed by [Propac] under this Agreement and [Propac] will cooperate with the Exchange toward the end that there will be an orderly transfer of management services functions, in respect to the Exchange's business, from [Propac] to the Exchange or its designee. As used herein "Anniversary Date" means the first day of the first calendar month in which insurance is bound or policies are issued by the Exchange."

In response, plaintiffs contend that the agreement must be enforced according to its terms citing *BayBank Middlesex* v. *1200 Beacon Properties, Inc.*, 760 F. Supp. 957, 963 (D. Mass. 1991), and *Freelander* v. *G. & K. Realty Corp.*, 357 Mass. 512, 516 (1970). Plaintiffs also argue that Propac may not now be heard to challenge matters relating to the Exchange's internal governance citing *Bello* v. *South Shore Hospital, supra.*, and that Propac, having dealt with the Exchange as an entity capable of conducting business, is now estopped from denying the Exchange's right, either to contract with it, or to enforce notice of termination under paragraph 16. *State Farm Mutual Automobile Ins. Co.*, v. *MacKechnie*, 114 F.2d 728, 735 (8th Cir. 1940).

The court rejects Propac's position as untenable. Paragraph 16 provides for termination by either *party*, without reason, at the time and in the manner provided, after an initial period of five years, presumably the agreed upon period to permit Propac to realize the benefit of its investment. Propac's position, if adopted, would eliminate paragraph 16 from the agreement. The Exchange, having placed direction of its affairs, subject to the agreement, in the Board of Advisors, would be powerless to act. The logic of Propac's position would result

in an attorney-in-fact removable by the Exchange only for good cause. That is not what the agreement provides. The language of paragraph 16 is not to be read out of the agreement. The court therefore rejects Propac's contention on this ground and rules that the notice of termination dated December 4, 1992, is a notice of termination by a "party" within the meaning of paragraph 16 of the agreement.

Having ruled that paragraph 16 of the agreement has force, and termination under it effect, the court now turns to Propac's essential position: The Exchange is a creature of statute; section 94K mandates a Board of Advisors "which . . . shall have the authority and duties provided" in the power of attorney. The power of attorney given by the subscribers, however, does not so provide. It is silent on that issue. It does provide, para. 12, that it "may be terminated at any time by the Subscriber, or by the Attorney-in-Fact, by the termination of all insurance contracts of Subscriber to which [the power of attorney] applies subject to" law and regulation. Therefore, Propac's reasons, the attorney-in-fact only may be terminated by the subscriber. And this conclusion makes sense, Propac argues, because it holds a fiduciary duty, which is not discharged unless and until the subscriber terminates the relationship.

The court disagrees. It does not view § 94K, the agreement, the bylaws, the license granted to the attorney-in-fact, the certificate of authority to conduct business granted to the Exchange and the power of attorney in isolation; rather, it perceives each such document as instruments integrated with each other forming one transaction governed by the statute, c. 175, §§ 94A-94M.

Art. VIII § 1 of the bylaws states that "The business and affairs of the Exchange subject to the contract with the Attorney-in-Fact, shall be under the advice and direction of the Board of Advisors." Considering that the agreement spells outs that the array of services Propac agreed to perform for a fee, see para. 5, this provision of the by-law is another formulation of the principle that the "attorney-in-fact has power

to administer the day to day operation of the reciprocal insurer such as keeping the books, executing policies of insurance, investigating claims and receiving service of process. [But the] ultimate power and responsibility of the management and control of the reciprocal insurer rests with the Advisory Committee." *Lumberman's Underwriting Alliance* v. *Corcoran*, 479 N.Y.S. 2d. 797, 798 (Supr. Ct. App. Div. N.Y. 1984). The license issued by the Commissioner authorizes Propac, "as attorney in fact for [the Exchange] . . . . to execute the contracts of reciprocal or inter-insurance for the subscribers of [the Exchange.]." Art. II § 2, of the by-laws is the place where the subscriber, the attorney-in-fact, and the Exchange intersect. It states that "[e]ach applicant for membership in the Exchange shall execute a power of attorney which shall be in such form as the board of Advisors shall prescribe, and every member, by virtue of his status as an insured, shall thereby adopt the then existing power of attorney and these By-laws and shall thereby authorize the Attorney-in-Fact to act in accordance *therewith*." (Emphasis supplied). As the "constitution and bylaws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members . . .", *Polin* v. *Kaplan*, 257 N.Y. 277 cited in *Williston On Contracts*, 3rd ed. Vol. 2, 308, "the bylaws of [the Exchange] are a contract between [the Exchange and the members of the Exchange] (citations omitted)." *Jessie* v. *Boynton*, 372 Mass. 293, 303 (1977). The subscriber thus agreed with the Exchange to adopt (1) the existing power of attorney (2) the bylaws and (3) to authorize Propac to act in accordance with the power of attorney *and* the bylaws. Propac by entering into an agreement with the Exchange contracted with the Exchange to do so; that is, the agreement, assigning to Propac for a fee the power of day to day administrative management, is consistent with, and in contemplation of, Art. VIII § 1 of the bylaws, which leaves the power to direct the balance of the affairs of the Exchange in the Board of Advisors. And within that residuum of power

is the power to set the terms of termination of the attorney-in-fact. In this case, as the product of bargaining, the Exchange and Propac have done so in unambiguous terms. That the terms of termination are reflected in the agreement, and not in the power of attorney, is of no moment. As stated, the power of attorney, the license, the bylaws, the agreement document one transaction.[4] That the power of attorney may be terminated at any time by a subscriber by the termination of insurance contracts speaks only to that individual subscriber. Paragraph 12 of the power of attorney does not relate to the termination of the attorney-in-fact as it is *common* to all subscribers of the Exchange. That, under the agreement, is left to the Exchange.

We turn now to the other two claims.

" 'Every contract implies good faith and fair dealing between the parties to it'." *Warner Ins. Co.* v. *Commissioner of Ins.*, 406 Mass. 354, 362 n. 9 (1990). "The implied covenant of good faith and fair dealing provides that 'neither party shall do anything that will have the effect of destroying or injuring the right of the other party to recover the fruits of the contract . . . .'." *Anthony's Pier Four, Inc.* v. *H.B.C. Associates*, 411 Mass. 451, 471-472 (1992) (other citations omitted). G.L. c. 93A, § 2(a) condemns " '[u]nfair . . . . acts or practices in the conduct of any trade or commerce.' This prohibition is 'extended to those engaged in trade or commerce in business transactions with others similarly engaged' by G.L. c. 93A, § 11 [citations omitted]. . . . [C]onduct 'in disregard of known contractual arrangements' and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes [citations omitted]." *Id.*, 474.

As an ultimate fact, I find that Propac on notice of termination refused and refuses to cooperate with the Exchange in an orderly transition to a new attorney-in-fact. Rather, Propac engages in a campaign to retain office in breach of a covenant,

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[4] That being the case, termination under paragraph 16 would not expose Propac to liability to an individual subscriber for violation of fiduciary duty since, as a result, the power of attorney terminates.

fairly read, that permits the Exchange, without cause, to terminate it. This it may not do. I rule that Propac is in violation of its covenant, implied in the agreement, of good faith and fair dealing, and I further rule that Propac's conduct constitutes unfair acts or practices in violation of c. 93A.

The Clerk will set down for hearing plaintiff's application for judgment.

SO ORDERED.

/s/ DAVID M. ROSEMAN
David M. Roseman
Justice of the Superior Court

DATED: December 30, 1993

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT

Civil Action No. 93-4987-G

MASSACHUSETTS EMPLOYERS INSURANCE EXCHANGE, and Associated Industries of Massachusetts, Inc., ATCO Plastics, Inc. and Humboldt Storage & Moving Co. as representative members of the Massachusetts Employers Insurance Exchange,

Plaintiffs,

—v.—

PROPAC-MASS., INC.,

Defendant.

JUDGMENT

This action came on for trial before this Court, David M. Roseman, Associate Justice, presiding on December 2, 3, 6, 7, 8 and 14, 1993. Thereafter, on December 30, 1993, the Court issued Findings of Fact and Conclusions of Law. The issues having been duly tried and the parties heard,

It is hereby Ordered and Adjudged as follows:

(1) That defendant PROPAC-MASS, Inc. ("PROPAC") has breached the Attorney-in-Fact Agreement (the "AIF Agreement") which it entered into with the Massachusetts Employers Insurance Exchange ("MEIE"), breached its covenant of good faith and fair dealing, implied in the AIF Agreement,

and violated G.L. c. 93A, §§ 2 and 11 by engaging in unfair trade practices;

(2) That the defendant is mandatorily enjoined to comply with the provisions of paragraphs 16 and 18 of the AIF Agreement, this shall include:

a. cooperating with and assisting the new attorney-in-fact of MEIE, MEIE Attorney-In-Fact, Inc. ("MEIE-AIF") in assuming all management service functions, in respect to MEIE's business, previously performed by PROPAC, including issuance of contracts of insurance and their endorsements, underwriting, loss control, premium collection, claim administration and payments, payment of any other liabilities owed, and investment and control of the assets of MEIE; and

b. delivery to MEIE-AIF, at MEIE's reasonable expense, of all records and information in the possession, custody or control of PROPAC concerning the affairs of MEIE.

(3) That, with respect to transfer of control of the assets of MEIE, PROPAC shall execute all documents which may be reasonably required by any bank or other financial services institution in which MEIE's funds are held in custodial, depository or other accounts to transfer control of such accounts to MEIE-AIF by January 11, 1994.

(4) That PROPAC shall complete all other obligations under this Judgment on or before January 11, 1994, or pursuant to such other time table as to which the parties may agree. If another time table is agreed upon by the parties, it shall be filed with this Court as an addendum to this Judgment and become a part hereof; and

(5) That plaintiffs shall submit an affidavit to this Court describing and supporting the reasonable attorneys fees and costs incurred by plaintiffs in prosecuting this action within 14 days. Defendants may file any objections to such sub-

mission within ten days thereafter. The Court will thereafter enter an award of reasonable attorneys fees and costs to plaintiffs and against PROPAC.

Dated at Suffolk County, Commonwealth of Massachusetts, this 6th day of January, 1994.

/s/ DAVID M. ROSEMAN
David M. Roseman, Associate Justice

APPENDIX G

175:5. Foreign companies; revocation of authority; petition for review.

Section 5. If the commissioner is satisfied, upon examination or other evidence submitted to him, that any foreign company is insolvent or is in an unsound financial condition, or that its business policies or methods are unsound or improper, or that its condition or management is such as to render its further transaction of business hazardous to the public or its policyholders, or that it is transacting business fraudulently, or that its officers or agents have refused to submit to an examination under section four or to perform any legal obligation relative thereto or that the amount of its funds, net cash or contingent assets is deficient or that its capital stock or deposit or guaranty capital or guaranty fund is impaired, as set forth in section twenty-three A, or that such capital stock, deposit or guaranty capital or guaranty fund has been reduced below the amount required by section one hundred and fifty-one, he shall revoke the license issued to said company under section one hundred and fifty-one and the licenses issued to all of its agents under this chapter; or, if he is satisfied, as aforesaid, that any foreign company has violated any provision of law or has failed to comply with its charter, he may revoke such licenses or suspend them for a period not exceeding the unexpired terms thereof. He shall give written notice to the company specifying the date on which such revocation or suspension shall be effective, the term of any such suspension and the ground for such revocation or suspension; provided, that if the ground for revocation or suspension is that the company has violated any provision of law or has failed to comply with its charter, the effective date of such revocation or suspension shall be not less than ten days from the date of issue of said notice, and the particulars of such violation or failure to comply with its charter shall be specified in said notice. Such notice may be served by registered mail, sent postage prepaid, addressed to

the company at its last home office address or, in the case of a company described in section one hundred and fifty-five, to its resident manager in the United States at his last address, appearing on the records of the commissioner. An affidavit of the commissioner, in such form as he may prescribe, or of anyone authorized by him to give such notice, appended to a copy thereof, that such notice has been mailed as aforesaid shall be prima facie evidence that such notice has been duly given. He shall also cause notice of such revocation or suspension to be published in such manner as he may deem necessary for the protection of the public. A company aggrieved by a revocation or suspension of its license hereunder, may within ten days from the effective date of such revocation or suspension file a petition in the supreme judicial court for the county of Suffolk for a review of such action of the commissioner. The court shall summarily hear and determine the question whether the ground for revocation or suspension specified in the notice of the commissioner exists and may make any appropriate order or decree. If the order or decree is adverse to the petitioning company it may within ten days therefrom appeal to the full court; and in case of such an appeal the revocation or suspension of the license of the said company shall continue in full force until the final determination of the question by the full court, unless vacated by the commissioner during the pendency of such appeal.

APPENDIX H

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 COURTHOUSE, BOSTON, MASSACHUSETTS 02108
(617) 557-1020

Raymond J. Kenney, Jr., Esquire
Martin, Magnuson, McCarthy & Kenney
101 Merrimac Street
Boston, MA 02114

RE: No. SJC-06610

PROPAC-MASS, INC.

vs.

COMMISSIONER OF INSURANCE

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

/s/ JEAN M. KENNETT
Jean M. Kennett, Clerk

Dated: September 7, 1995

To: Raymond J. Kenney, Jr., Esquire
Thomas A. Barnico, A.A.G.
Daniel Judson, Esquire
Dennis A. Durkin, Esquire

APPENDIX I

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 COURTHOUSE, BOSTON, MASSACHUSETTS 02108
(617) 557-1020

Raymond J. Kenney, Jr., Esquire
Martin, Magnuson, McCarthy & Kenney
101 Merrimac Street
Boston, MA 02114

RE: Docket No. SJC-06610

PROPAC-MASS, INC.

vs.

COMMISSIONER OF INSURANCE

NOTICE OF DOCKET ENTRY

Please take note that on August 10, 1995, the following entry was made on the docket of the above-referenced case:

MOTION of Plaintiff-Movant Propac-Mass, Inc. for Leave to Enlarge Time to File Petition for Rehearing filed. August 29, 1995: Denied by the Court. Notice to Counsel.

Jean M. Kennett, Clerk

Dated: August 29, 1995

To: Raymond J. Kenney, Jr., Esquire
Thomas A. Barnico, A.A.G.
Daniel Judson, Esquire
Dennis A. Durkin, Esquire